


Docket No.: C1037.70042US00  
(PATENT)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Arthur M. Krieg  
Serial No.: 10/613,524  
Confirmation No.: 4728  
Filed: July 3, 2003  
For: NUCLEIC ACID COMPOSITIONS FOR STIMULATING IMMUNE  
RESPONSES  
Examiner: O. A. Ogunbiyi  
Art Unit: 1645

<b>Certificate of Electronic Filing Under 37 CFR 1.8</b>	
I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being transmitted via the Office electronic filing system in accordance with § 1.6(a)(4).	
Dated: December 18, 2009	Signature: 

**REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT**  
**UNDER 37 CFR §1.705(D)**

Mail Stop Patent Ext.  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

Applicant respectfully requests reconsideration of the patent term adjustment (PTA) indicated on the front page of U.S. Patent No. 7605138 issued on October 20 2009. It is respectfully requested that Applicant be granted a PTA of 1309 days instead of 732 days.

Applicant previously submitted an Application for Patent Term Adjustment under 37 CFR §1.705(b) on April 27 2009 which included a statement of the facts and the required fee set forth in 37 CFR §1.18(e). This Application was dismissed, in part, as being premature and granted, in part, as described in greater detail below. The present request for reconsideration is therefore considered timely filed, in accordance with 37 CFR §1.705(d).

Further in accordance with 37 CFR §1.705(d), a statement of the facts and the required fee are provided herein.

1. As of the issuance of U.S. Patent No. 7605138, the correct PTA is 1309 days and not 732 days as calculated by the USPTO.

2. The correct PTA of 1309 days is the net USPTO delay of 1572 days minus the apparent net Applicant delay of 263 days.

3. According to the Patent Term Adjustment History downloaded from the Patent Application Information Retrieval (PAIR) system on December 18 2009 (Exhibit 1), the USPTO accorded U.S. Patent No. 7605138 a net PTA of 732 days resulting from 995 days of USPTO delay minus 189 days of Applicant delay and including a "USPTO Adjustment" of -74 days (i.e., minus 74 days).

4. The difference between Applicant's PTA calculation (1309 days) and the USPTO's PTA calculation (732 days) results, in part, from the USPTO's failure to issue U.S. Patent No. 7605138 within three years of its actual filing date, i.e. by July 3 2006. *See* 35 USC §154(b)(1)(B). Applicant filed a Request for Continued Examination (RCE) on October 30 2008 which resulted in an exclusion of time from that date forward. *See* 35 USC §154(b)(B)(i). The period of delay thus began on the first day following the three year period (i.e., July 4 2006) and ended on October 30 2008<sup>1</sup>, resulting in a USPTO delay of 850 days.

5. The response to the previously submitted Application for Patent Term Adjustment, received from the Office of Petitions and dated September 18 2009, did not reconsider the delay under 37 CFR §1.705(b), as it was considered premature.

6. The USPTO's PTA calculation methodology has been consistently applied by the USPTO in making all PTA calculations. Those methods, however, are contrary to the statute as detailed in the Memorandum and Order entered by the United States District Court for the District of Columbia in *Wyeth v. Dudas*, Civil Action No. 07-1492 (D.D.C. Sept. 30, 2008), in which the

Court granted summary judgment holding the USPTO's PTA methodology was erroneous as a matter of law.

7. The correct PTA methodology, as determined in *Wyeth v. Dudas*, governs the USPTO's calculation of the PTA for U.S. Patent No. 7605138. Applicant's PTA methodology, as outlined above, is consistent with the correct PTA methodology determined in *Wyeth v. Dudas*.

8. Applicant's PTA calculation and the USPTO's PTA calculation also take into account the submission of a series of Information Disclosure Statements on December 10 2008, December 22 2008, and January 12 2009. If considered to be supplemental replies, these submissions may result in Applicant delays of 41 days (period from October 31 2008 to December 10 2008), 53 days (period from October 31 2008 to December 22 2008), and 74 days (period from October 31 2008 to January 12 2009). *See* 37 CFR §1.704(c)(8). These submissions therefore may result in an Applicant delay of 74 days once overlapping days are excluded.

9. The Patent Term Adjustment History submitted with the previously submitted Application for Patent Term Adjustment did not indicate any Applicant delay for these submissions, and instead indicated a total Applicant delay of 189 days. In the response to that Application for Patent Term Adjustment, the Office of Petitions agreed with Applicant's calculation of 74 days.

10. Exhibit 1 indicates an Applicant delay of 189 days and a "USPTO Adjustment" of minus 74 days. When combined, these periods total a delay of 263 days, which is consistent with the Applicant delay in Applicant's PTA calculation.

11. Finally, U.S. Patent No. 7605138 granted more than 4 months after payment of the issue fee, further contributing to USPTO delay. *See* 37 CFR §1.703(a)(6) ("The number of days, if any, in the period beginning on the day after the date that is four months after the date the issue fee was paid and all outstanding requirements were satisfied and ending on the date a patent was issued.). Applicant paid the issue fee on April 27 2009 and U.S. Patent 7605138 granted on October 20 2009. This period of delay therefore began four months and a day after the issue fee was paid (i.e., August

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<sup>1</sup> The Application for Patent Term Adjustment Under 37 CFR §1.705 dated April 27 2009 indicated that this period ended on October 29 2008. Applicant believes this was an error and that the period correctly ends on October 30 2008, the date the RCE was filed.

28 2009) and ended on the day U.S. Patent No. 7605138 granted (i.e., October 20 2009), and totaled 54 days. This USPTO delay is indicated in Exhibit 1 as "PTA 36 Months". This period of time does not overlap with the other USPTO delays set forth herein.

12. The net USPTO delay of 1572 days is the sum of the three delay periods (941 days, 850 days, and 54 days) minus the number of days these periods overlap on the calendar (273 days). *See Wyeth v. Dudas*, 580 F. Supp. 2d at 138, 141 (D.D.C. 2008) (holding that the "only way that periods of time can 'overlap' is if they occur on the same day"). The period of overlap occurred from July 4 2006 through April 2 2007.

13. The apparent net Applicant delay of 263 days is the sum of the apparent Applicant delay periods (97 days, 92 days, 41 days, 53 days, and 74 days) minus the number of days these periods overlap on the calendar (94 days). The periods of overlap occurred from October 31 2008 through December 10 2008 and from October 31 2008 through December 22 2008.

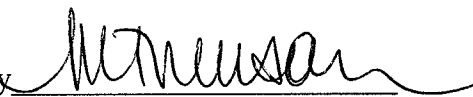
14. Accordingly, the correct PTA is 1309 days which is the total period of USPTO delay (1572 days) minus the total period of Applicant delay (263 days).

15. A terminal disclaimer was not filed in U.S. Patent No. 7605138 and the patent is not subject to a terminal disclaimer.

Applicant submits \$200.00 as set forth in 37 CFR § 1.18(e). If there is any additional fee occasioned by this Request that is not covered by the enclosed fee, please charge any deficiency to Deposit Account No. 23/2825.

Dated: December 18, 2009

Respectfully submitted,

By 

Maria A. Trevisan, Reg. No. 48,207  
WOLF, GREENFIELD & SACKS, P.C.  
Federal Reserve Plaza  
600 Atlantic Avenue  
Boston, Massachusetts 02210-2206  
617.646.8000

Exhibit 1

10/613,524	NUCLEIC ACID COMPOSITIONS FOR STIMULATING IMMUNE RESPONSES	12-18-2009::13:45:34
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**Patent Term Adjustments**

Patent Term Adjustment (PTA) for Application Number: 10/613,524

Filing or 371(c) Date:	07-03-2003	USPTO Delay (PTO) Delay (days):	995
Issue Date of Patent:	10-20-2009	Three Years:	-
Pre-Issue Petitions (days):	+0	Applicant Delay (APPL) Delay (days):	189
Post-Issue Petitions (days):	+0	Total PTA (days):	732
USPTO Adjustment(days):	-74	Explanation Of Calculations	

**Patent Term Adjustment History**

Date	Contents Description	PTO(Days)	APPL(Days)
09-30-2009	PTA 36 Months		
10-20-2009	Patent Issue Date Used in PTA Calculation	54	
09-23-2009	Dispatch to FDC	↑	
09-18-2009	Mail-Record a Petition Decision of Granted for Patent Term Adjustment after Allowance	↑	
09-18-2009	Record a Petition Decision of Granted for Patent Term Adjustment after Allowance	↑	
09-18-2009	Record a Petition Decision of Granted for Patent Term Adjustment after Allowance	↑	
09-17-2009	Adjustment of PTA Calculation by PTO		74
09-17-2009	Adjustment of PTA Calculation by PTO		
05-08-2009	Mail Miscellaneous Communication to Applicant		↑
05-08-2009	Miscellaneous Communication to Applicant - No Action Count		↑
04-27-2009	Petition Entered		↑
04-28-2009	Application Is Considered Ready for Issue		↑
04-27-2009	Issue Fee Payment Verified		↑
04-27-2009	Issue Fee Payment Received		↑
02-13-2009	Sequence Forwarded to Pubs on Tape		↑
01-27-2009	Mail Notice of Allowance		↑
01-22-2009	Document Verification		↑
01-21-2009	Notice of Allowance Data Verification Completed		↑
01-21-2009	Case Docketed to Examiner in GAU		↑
01-21-2009	Examiner's Amendment Communication		↑
01-12-2009	Examiner Interview Summary Record (PTOL - 413)		↑
12-22-2008	Information Disclosure Statement (IDS) Filed		↑
12-10-2008	Reference capture on IDS		↑
12-10-2008	Information Disclosure Statement (IDS) Filed		↑
12-22-2008	Information Disclosure Statement considered		↑
12-10-2008	Information Disclosure Statement considered		↑
12-22-2008	Information Disclosure Statement (IDS) Filed		↑
12-10-2008	Information Disclosure Statement (IDS) Filed		↑

11-17-2008	Date Forwarded to Examiner	↑
11-17-2008	Date Forwarded to Examiner	↑
10-30-2008	Request for Continued Examination (RCE)	92
11-17-2008	DISPOSAL FOR A RCE/CPA/129 (express abandonment if CPA)	↑
10-30-2008	Request for Extension of Time - Granted	↑
10-30-2008	Workflow - Request for RCE - Begin	↑
04-30-2008	Mail Final Rejection (PTOL - 326)	↑
04-28-2008	Final Rejection	
02-12-2008	Date Forwarded to Examiner	
01-02-2008	Response after Non-Final Action	97
01-02-2008	Request for Extension of Time - Granted	↑
06-27-2007	Mail Non-Final Rejection	↑
06-11-2007	Non-Final Rejection	
04-29-2004	Information Disclosure Statement considered	
10-27-2004	Information Disclosure Statement considered	
03-21-2005	Information Disclosure Statement considered	
12-08-2006	Information Disclosure Statement considered	
05-18-2007	Date Forwarded to Examiner	
05-07-2007	Response to Election / Restriction Filed	
04-02-2007	Mail Restriction Requirement	941
03-29-2007	Requirement for Restriction / Election	↑
12-08-2006	Reference capture on IDS	↑
12-08-2006	Information Disclosure Statement (IDS) Filed	↑
12-08-2006	Information Disclosure Statement (IDS) Filed	↑
11-01-2006	Miscellaneous Incoming Letter	↑
07-27-2006	Preliminary Amendment	↑
08-01-2006	Error(s) in CRF Corrected by STIC	↑
06-22-2006	Mail Letter Requiring CRF (Unreadable, Non-Compliant, Not Submitted)	↑
06-20-2006	CRF Diskette Unreadable / Did Not Comply / Required but Not Submitted	↑
06-15-2006	Case Docketed to Examiner in GAU	↑
04-05-2006	Case Docketed to Examiner in GAU	↑
12-01-2005	IFW TSS Processing by Tech Center Complete	↑
03-21-2005	Information Disclosure Statement (IDS) Filed	↑
03-21-2005	Information Disclosure Statement (IDS) Filed	↑
10-27-2004	Reference capture on IDS	↑
10-27-2004	Information Disclosure Statement (IDS) Filed	↑
10-27-2004	Information Disclosure Statement (IDS) Filed	↑
08-31-2004	Case Docketed to Examiner in GAU	↑
04-29-2004	Reference capture on IDS	↑

04-29-2004	Information Disclosure Statement (IDS) Filed	↑
04-29-2004	Information Disclosure Statement (IDS) Filed	↑
06-25-2004	Receipt of all Acknowledgement Letters	↑
04-29-2004	New or Additional Drawing Filed	↑
05-03-2004	Receipt of Acknowledgment Letter	↑
01-27-2004	Application Return from OIPE	↑
01-27-2004	Application Return TO OIPE	↑
01-27-2004	Application Dispatched from OIPE	↑
01-28-2004	Application Is Now Complete	↑
01-12-2004	Payment of additional filing fee/Preexam	↑
07-03-2003	Claim Preliminary Amendment	↑
01-12-2004	A statement by one or more inventors satisfying the requirement under 35 USC 115, Oath of the Applic	↑
11-12-2003	Receipt of Acknowledgment Letter	↑
11-12-2003	Notice Mailed--Application Incomplete--Filing Date Assigned	↑
10-27-2003	Agency Referral Letter Mailed	↑
10-09-2003	Agency Referral Letter Mailed	↑
10-09-2003	Agency Referral Letter Mailed	↑
10-08-2003	Referred by L&R for Third-Level Security Review. Agency Referral Letter Generated	↑
10-08-2003	Referred by L&R for Third-Level Security Review. Agency Referral Letter Generated	↑
10-08-2003	Referred by L&R for Third-Level Security Review. Agency Referral Letter Generated	↑
10-07-2003	Referred to Level 2 (LARS) by OIPE CSR	↑
08-12-2003	IFW Scan & PACR Auto Security Review	↑
08-06-2003	CRF Is Good Technically / Entered into Database	↑
07-03-2003	CRF Disk Has Been Received by Preexam / Group / PCT	↑
07-03-2003	Initial Exam Team nn	↑

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